DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Steven Mulipola
v
Department of Veterans' Affairs, Hays Specialist Recruitment (Australia) Pty Limited
(U2022/5314)

COMMISSIONER BISSETT MELBOURNE, 16 AUGUST 2022

Application for an unfair dismissal remedy – jurisdictional objections – casual employee not employed on a regular and systematic basis - minimum employment period not met – no dismissal – joint employment.

[1] Mr Steven Mulipola has made an application to the Fair Work Commission in which he seeks relief from unfair dismissal pursuant to s.394 of the *Fair Work Act 2009* (FW Act). The application was made on 12 May 2022. Mr Mulipola says his employment was terminated on 9 May 2022.

[2] In his application Mr Mulipola says that he was employed by both Hays Specialist Recruitment (Australia) Pty Limited (Hays) and the Department of Veterans' Affairs (DVA). When asked by the Commission to nominate his employer in relation to his dismissal Mr Mulipola requested that the Commission first determine who his employer was. To this end I requested of Hays and DVA that they file, as each considered appropriate, either a Form F3 – Employer response to unfair dismissal application (Form F3) or a Form F4 – Objection to unfair dismissal application (Form F4). Pursuant to this request Hays filed a Form F3 in which it also raised some objections in response to the application and DVA filed a Form F4.

[3] Following receipt of this material I issued directions for the filing of evidence and submissions by Hays, DVA and Mr Mulipola.

[4] Prior to hearing the objections I granted DVA permission to be represented by a lawyer pursuant to s.596(2) of the FW Act.

[5] This decision deals with Mr Mulipola's request that the Commission determine his employer and the objections raised by Hays and DVA.

OBJECTIONS

[6] DVA and Hays has each provided their objections to the application of Mr Mulipola. The details of the objections are set out in brief form below.

Hays objections

[7] Hays objects to the application by Mr Mulipola on two grounds.

[8] *First*, it says that Mr Mulipola was not dismissed from his employment with Hays. It says that it engaged Mr Mulipola as a temporary employee on a casual employment contract whereby Mr Mulipola could accept (or reject) any temporary assignment offered to him by Hays. Mr Mulipola was offered, and accepted, a temporary assignment with DVA on 3 February 2022. He commenced the assignment on 21 March 2022 and that assignment ended on 9 May 2022. At that time Hays did not terminate Mr Mulipola's employment although the specific engagement had concluded.

[9] *Second* Hays says that Mr Mulipola did not meet the minimum employment period with Hays such that he is not protected from unfair dismissal. Mr Mulipola was placed on assignment by Hays with the Department of Health from 25 March 2021 to 29 June 2021. His next assignment from Hays was with DVA from 21 March 2022 to 9 May 2022. During the period 30 June 2021 to 20 March 2022 Mr Mulipola was not required to, and did not, perform any work for Hays. Mr Mulipola was employed as a casual employee. Hays says that Mr Mulipola was not employed on a regular and systematic basis, and, during his period of employment with Hays, he could not have had a reasonable expectation of regular and systematic employment.

DVA objections

[10] DVA objects to the application of Mr Mulipola on two grounds.

[11] *First,* DVA says that it was not the employer of Mr Mulipola. Rather, it says that DVA entered into a contract with Hays for Hays to provide labour to it and that Mr Mulipola was placed to work with DVA pursuant to that services agreement.

[12] To the extent that Mr Mulipola relies on an argument as to joint employment, DVA says that is not a concept accepted in common law in Australia.

[13] *Second* DVA says that, even if it was the employer of Mr Mulipola (which it does not concede), Mr Mulipola worked for DVA for the period 21 March 2022 to 9 May 2022 and hence did not complete the minimum employment period necessary such that he would be protected from unfair dismissal. To the extent Mr Mulipola relies on a previous period of employment by Hays where he was placed with the Department of Health, that period of employment was not continuous with his placement at DVA, there being a break of 8 months and 22 days between the two periods.

SUBMISSIONS AND EVIDENCE

[14] In accordance with the Directions issued:

- Hays filed submissions and a witness statement of Ms Leanne Bennett, Senior Recruitment Partner, for Hays.

- DVA filed submissions and a witness statement of Ms Toni Caldwell, Assistant Director, Claims Determination, Liability and Compensation, for DVA.

- Mr Mulipola filed submissions and a witness statement.

[15] No objection was taken to the material filed by the various parties.

LEGISALTIVE PROVISIONS

[16] Section 382 of the FW Act sets out when a person is protected from unfair dismissal. Section 382 states that:

> **382 When a person is protected from unfair dismissal**
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> A person is ***protected from unfair dismissal*** at a time if, at that time:
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> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
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> (b) one or more of the following apply:
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> (i) a modern award covers the person;
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> (ii) an enterprise agreement applies to the person in relation to the employment;
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> (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[17] Minimum employment period is defined in s.383 of the FW Act as follows:

> **383 Meaning of minimum employment period**
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> The minimum employment period is:
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> (a) if the employer is not a small business employer—6 months ending at the earlier of the following times:
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> (i) the time when the person is given notice of the dismissal;
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> (ii) immediately before the dismissal; or
>
> (b) if the employer is a small business employer—one year ending at that time.

[18] Section 384(1) of the FW Act defines "period of employment" and, at s.384(2) when casual employment does not count towards the period of employment and the exception to this exclusion (s.384(2)(a) of the FW Act). Section 384 of the FW Act states as follows:

384 Period of employment

(1) An employee's ***period of employment*** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was as a regular casual employee; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer.

[19] That is, as a general rule, a period of service as a casual employee does not count in determining the "period of employment" except if the casual employee was a regular and systematic employee and there was, during the period of service, a reasonable expectation of regular and systematic employment.

[20] If a person is not protected from unfair dismissal the person is not eligible to make an application for unfair dismissal. Section 396 of the FW Act requires that the Commission determine if a person is protected from unfair dismissal (amongst other matters) prior to considering the merits of a claim.

[21] Section 385 of the FW Act says that, for a person to have been unfairly dismissed, they must be dismissed, the dismissal was harsh, unjust or unreasonable, the dismissal not be consistent with the Small Business Fair Dismissal Code and the dismissal not a case of genuine redundancy.

[22] Whether a person has been dismissed from their employment is dealt with in s.386 of the FW Act. Section 386 of the FW Act states that:

> **386 Meaning of *dismissed***
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> (1) A person has been ***dismissed*** if:
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> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
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> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
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> …

APPROACH TO MATTER

[23] Mr Mulipola submits that there are five issues to be determined by the Commission:

(i) Who was his employer?

(ii) Is there joint employment?

(iii) Has Mr Mulipola completed the minimum period of employment?

(iv) Was Mr Mulipola dismissed and, if so, by whom?

(v) If there was no joint employment, is DVA potentially accessorily liable as a person involved in a contravention of the FW Act (s.550 of FW Act) and is it appropriate to join them?

[24] Whilst all of these issues may be relevant they do not all need to be answered, although some answers are dependent on others.

[25] If it is that Mr Mulipola has not served the minimum employment period the remaining matters do not need to be considered as, having not met the minimum employment period, Mr Mulipola will not be protected from unfair dismissal.

[26] I accept that, for the minimum employment period to be a relevant consideration, Mr Mulipola must have been dismissed from his employment. This is not conceded by Hays. In reaching my conclusion below I have done so on the basis that Mr Mulipola was dismissed from his employment on 9 May 2022 as he claims. This should not be taken as a finding that Mr Mulipola has, in fact, been dismissed. Had I found that Mr Mulipola had met the minimum employment period I would then move to consider whether he had, in fact, been dismissed. For the reasons given below I do not need to determine the question of dismissal.

MINIMUM EMPLOYMENT PERIOD

[27] In order to determine if Mr Mulipola has met the minimum employment period such that he is protected from unfair dismissal and able to make an application for unfair dismissal it is necessary to determine how his period/s of casual employment should be treated (s.384(2) of the FW Act).

[28] It is not in dispute and I am satisfied of the following timeline with respect to Mr Mulipola's more recent history of employment:

Date[1]	Employment
27 January 2021	Mr Mulipola signs a "Terms of Engagement" (ToE) with Hays.[2] The ToE, as is relevant to this matter, provides that: • Hays will offer Mr Mulipola casual assignments as a temporary casual employee to perform services for any client of Hays (clause 2.1). • Each casual assignment is a separate and distinct engagement with Hays (clause 2.3). • Mr Mulipola acknowledges that the "nature" of each engagement is as a "temporary casual worker" which means the work is "intermittent, irregular and unpredictable" and that there may be periods where he is offered no work; that Hays is under no obligation to offer him casual assignments and he is under no obligation to accept any offer; and that Hays is under no obligation to pay Mr Mulipola should he not be offered or be performing a causal assignment (clause 3.1). • Hays does not guarantee the length of any casual assignment (clause 3.2). • Mr Mulipola agrees that if the client ends the casual assignment Hays may terminate his engagement (clause 3.3).
25 March 2021 to 29 June 2021	Mr Mulipola completes an assignment as a casual employee of Hays at the Department of Health.[3]
July 2021 to January 2022	Mr Mulipola undertakes an assignment[4] with the NDIA through a different employment agency (DFP Recruitment[5]).
21 January 2022	Hays email Mr Mulipola in relation to a potential assignment at DVA.[6]
1 February 2022	Following an invitation from Hays, Mr Mulipola attends an interview with DVA.[7]
3 February 2022[8]	Hays advise Mr Mulipola that he is successful and is "offered a position…at the DVA."[9]

[1] Throughout Mr Mulipola's submissions he transposes months and years. These dates are as put by Mr Mulipola and Hays during the hearing and I have accepted these as the correct dates. Where Mr Mulipola's submissions have an obvious typographical error in the date (e.g. paragraph 33 of his submissions where he says his employment with DVA ended on 9 May 2021) I have used the correct date and do not point out these mistakes

[2] Witness statement of Mr Mulipola, paragraph 5

[3] Witness statement of Mr Mulipola, paragraph 6. A copy of the Terms of Engagement can be found at Annexure 1 to the submissions of Hays Specialist Recruitment (Australia) Pty Ltd

[4] Witness statement of Mr Mulipola, Annexure A

[5] Oral evidence of Mr Mulipola

[6] Witness statement of Mr Mulipola, paragraph 7. Note however that Ms Bennett of Hays says in her evidence that Mr Mulipola contacted Hays. The resolution of this difference is not necessary for the purpose of this decision

[7] Witness statement of Mr Mulipola, paragraph 9

[8] The evidence of Ms Bennett is that the advice to Mr Mulipola was given on 3 February 2022 and Mr Mulipola accepts that this is the correct date

[9] Witness statement of Mr Mulipola, paragraph 10

18 February 2022	Hays send Mr Mulipola an email titled "Hays assignment commencement confirmation"[10] which advised a commencement date "TBC" but likely to be 14 or 21 March 2022.[11]
14 March 2022	DVA send an email to Mr Mulipola, copied to Hays, confirming a commencement on 21 March 2022.[12]
21 March 2022	Mr Mulipola commences assignment with DVA.[13]
11 April 2022 to 6 May 2022	Hays receive a number of contacts from DVA regarding Mr Mulipola's attendance.[14]
9 May 2022	Ms Caldwell of DVA speaks to Ms Bennett of Hays and advises that a review of Mr Mulipola's timesheets "identified a regular pattern of Mr Mulipola stating work late 2 to 3 times each week throughout the assignment". Ms Caldwell formed the view that Mr Mulipola was not committed to the role at DVA and intended to end his assignment that day.[15] Ms Bennett rings Mr Mulipola and advises that DVA will not be continuing his assignment.[16] Mr Mulipola's assignment with DVA ends.[17]

Was Mr Mulipola employed by DVA for the minimum employment period?

[29] Without needing to determine whether Mr Mulipola was actually employed by DVA it is clear that Mr Mulipola only performed work at DVA for a period of just 7 weeks and 1 day. This is a period well short of the minimum employment period of 6 months.

[30] Even if I found that Mr Mulipola was employed by DVA he has not completed the minimum employment period with DVA such that he is not protected from unfair dismissal and his application would fail in this regard.

[31] I would observe, in addition, that the evidence before me does not suggest that the necessary elements in relation to the making of a contract *between Mr Mulipola and DVA* are present, namely, offer, acceptance, consideration and intention to be legally bound. To the extent Mr Mulipola might suggest this can be inferred from the Work Order[18] it is difficult to see how a contract could be created where at least one of the parties (DVA) neither wanted nor intended such an outcome and where Mr Mulipola is not a party to that "contract". As was said by the Full Bench in *Bunt v ITW Proline*[19] **(Bunt)** such an outcome would be "contrary to well-established principles of contract law that a contract of employment cannot be forced upon someone without their consent."[20]

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[10] Witness statement of Ms Bennett, paragraph 8

[11] Witness statement of Mr Mulipola, Annexure D

[12] Witness statement of Ms Bennett, paragraph 9. Witness statement of Mr Mulipola, Annexure E

[13] Witness statement of Ms Bennett, paragraph 10

[14] Witness statement of Ms Bennett, paragraphs 11 to 17

[15] Witness statement of Ms Bennett, paragraph 19

[16] Witness statement of Ms Bennett, paragraph 22

[17] Witness statement of Mr Mulipola, paragraph 10

[18] Witness statement of Toni Caldwell, Annexure TC-1

[19] [2014] FWCFB 2328

[20] Ibid at [6]

[32] To the extent Mr Mulipola argues he was engaged in "joint employment" with Hays and DVA he must rely on his employment by Hays to demonstrate that he has completed the minimum employment period.

[33] I am not convinced, on the submission of Mr Mulipola, that the concept of joint employment exists. As the Full Bench observed in *Bunt:*

> **[11]** …There have been numerous decisions of the courts and the Commission about such arrangements. It is clear that the mere existence of the labour hire arrangement is not of itself sufficient to render the hirer to be the employer of the hired worker.[21]
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> **[12]** The general position was stated by Buchanan J in *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* as follows:
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> "...arrangements whereby labour is provided by one company to another, without the recipient becoming thereby an employer, are longstanding and unremarkable. There appears no place for an assumption of illegality or illegitimate purpose from the mere fact that a "labour hire" arrangement has been put in place. The Australian cases recognise that, provided the arrangement meets certain objective criteria.
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> Utilisation in Australia of labour hire arrangements has increased significantly in past decades. There is no doubt that sometimes such arrangements reflect a desire by the proprietors of a business to avoid liability for employment related obligations. That is not illegal as an objective..."[22]

[34] I see no reason to depart from the reasoning of the Full Bench such that DVA could not be Mr Mulipola's employer. Joint employment therefore does not arise.

Was Mr Mulipola engaged by Hays for the minimum employment period?

[35] It is not in dispute that Mr Mulipola was engaged by Hays as a casual employee. His contract with Hays is clear on this. When engaged by Hays, Mr Mulipola would be placed on assignment by Hays with one of its clients. It is also not in dispute that for a period from July 2021 to January 2022 Mr Mulipola did not perform work for Hays and, in fact, performed work for a different employer during this period.

[36] Mr Mulipola argues that he has completed the minimum employment period with Hays on two alternative grounds:[23]

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[21] See, e.g. *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174; *Damevski v Giudice* (2003) 133 FCR 438; *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605 (PR545422)

[22] (2011) 198 FCR 174, 191 [60] - [61]

[23] Submissions of Mr Mulipola, paragraph 32-33

(a) He was employed by Hays for a continuous period of 15 months and 2 days (from 27 January 2021 until 9 May 2022[24]).

(b) Alternatively, he was employed on a continuous basis by Hays on each of the two distinct assignments for a cumulative period of 6 months and 9 days (from 25 March 2021 to 29 June 2021, a period of 3 months and 4 days when with the Department of Health and then from 3 February 2022[25] to 9 May 2022, a period of 3 months and 6 days in relation to the placement with DVA).

[37] In the circumstances in item (b) above Mr Mulipola submits that he was a regular and systematic casual employee and that he had a reasonable expectation of on-going regular and systematic employment such that the period should count towards his period of employment.

[38] It is uncontroversial that, if it is that Mr Mulipola has been dismissed, he must have served a period of employment of at least 6 months to be protected from unfair dismissal. For Mr Mulipola to have been employed for the minimum employment period he must show that either he was employed continuously by Hays for at least 6 months (s.382(a) and s.384(1) of the FW Act) or that he meets both limbs of the exception to the general exclusion of casual employment from the determination of the period of employment (s.384(2) of FW Act). It is only if Mr Mulipola can demonstrate that he meets both limbs will his *period of service* as a casual employee count towards his *period of employment*.

[39] It is uncontentious that Mr Mulipola had two placements as a temporary casual employee by Hays – the first from 25 March 2021 to 29 June 2021 with the Department of Health (a period of 3 months and 4 days) and from 21 March 2022 to 9 May 2022 with DVA (a period of 7 weeks, although I acknowledge Mr Mulipola says the second period commenced on 3 February 2022).

[40] There was a break of 8 months and 3 weeks (or 7 months and 6 days) between the Hays assignments. In this period Mr Mulipola undertook work for DFP Recruitment. This was not work with or on placement by Hays. The evidence before me does not disclose that Mr Mulipola received any payment from Hays in this 8 month period and he does not claim to have done so.

[41] Mr Mulipola, in his submissions, seeks to distinguish the finding of Deputy President McCarthy in *Holland v UGL Resources Pty Ltd T/A UGL Resources*[26] (**UGL Resources)** where it was said that "continuous service" should be given its ordinary meaning[27] such that I should not rely on that decision in determining the matter before me.

[42] Mr Mulipola says that "continuous service" has a particular legal meaning attributed to it by s.22 of the FW Act. Mr Mulipola relies on extracts from the Commission's unfair dismissal Benchbook (**Benchbook**) in support of his submission that "service" is the period an employee is employed by the employer, and "continuous service" is a period of unbroken service, and

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[24] This period is actually 15 months and 11 days

[25] Mr Mulipola claims his placement with DVA commenced at the time he was advised by Hays that he was successful in gaining that placement on 3 February 2022

[26] [2012] FWA 3453

[27] Ibid at [20]

continuous service is broken by resignation, dismissal or a transfer of employment which does not otherwise meet the definition of transfer of employment in s.22(7) of the FW Act. As he did not resign and was not dismissed in the period he claims to have been continuously employed, Mr Mulipola therefore says he was continuously employed from January 2021 until May 2022.

[43] In the alternative, Mr Mulipola claims to have had a reasonable expectation of ongoing causal employment on a regular and systematic basis such that his period of service as a casual employee counts to his period of employment. Mr Mulipola submits that the test in s.382(1) of the FW Act is partly subjective and consideration must be given to whether he had a reasonable expectation. Mr Mulipola submits that an individuals' perception of timeframes are a relevant consideration.[28]

[44] Mr Mulipola also says that his expectation of regular and systematic employment was reasonable because he liked working for Hays and may have left his assignment through DFP Recruitment if Hays had offered him an alternative role.

(i) What is Mr Mulipola's period of service with Hays?

[45] The Full Bench considered the operation of s.384 of the FW Act in *Shortland v The Smiths Snackfood Co Ltd*[29] where they said:

> **[10]** As a matter of the common law of employment, and in the absence of an agreement to the contrary, each occasion that a casual employee works is viewed as a separate engagement pursuant to a separate contract of employment. Casual employees may be engaged from week to week, day to day, shift to shift, hour to hour or for any other agreed short period.[30] In this sense no casual employee has a continuous period of employment beyond any single engagement. Moreover, it is common for a casual employee to transition between a period in which their engagements with a particular employer are intermittent and a period in which their engagements are regular and systematic and vice versa. It is against that background that s.384 must be construed
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> **[11]** The criteria in s.384(2)(a) make it clear that s.384 does not proceed on the basis that a casual employee's *period of employment* for the purposes of the unfair dismissal remedy starts and ends with each engagement as understood in the common law of employment.
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> **[12]** Moreover, it is more than tolerably clear that s.384 is concerned with how an employee's *period of employment* is calculated for the purposes of s.382(a). Section 384(2) draws a distinction between a *period of service* and a *period of employment*. It also draws a distinction between *a period of continuous service* and *a period of* service: a *period of continuous service* can be made up of a series of *periods of service*, some of which count towards the *period of continuous service* (ie. where the conditions in

[28] *Holland v UGL Resources Pty Ltd T/A UGL Resources* [2012] FWA 3453 at [28]-[30]

[29] [2010] FWAFB 5709, (2010) 198 IR 237

[30] *Andison v Woolworths Limited*, IRCA, N1522 of 1994, 8 August 1995 per Moore J at pp3-4

> s.384(2)(a)(i) and (ii) are met) and some of which do not (ie. where one of the conditions in s.384(2)(a)(i) or (ii) is not met)…

[46] Absent evidence of any agreement to the contrary, it must be accepted that Mr Mulipola was engaged on an "as needs" basis by Hays when it had an assignment that it considered it should offer to him which he agreed to undertake.

[47] Mr Mulipola says he worked for Hays continuously from 27 January 2021 until 9 May 2022 when he submits his employment was terminated – a period of just over 15 months. During this period Mr Mulipola only performed work for Hays on assignment for which he received pay from Hays on two occasions, the first for 3 months in 2021 with the Department of Health and the second for just over 7 weeks (or 12 weeks if the placement commenced on 3 February 2022) in 2022 with DVA. In the period in between Mr Mulipola performed work for someone else. It is difficult to see how the period of time when Mr Mulipola did not work for Hays could be considered continuous service with his actual periods of engagement with Hays.

[48] In *UGL Resources* Deputy President McCarthy said:

> **[20]** Continuous service is not expressly defined by either s.12 or s.22 [of the FW Act]. Rather, s.22(3) deems what would otherwise be service that is not continuous, to be continuous for periods of particular types of "absences". Therefore, other than for the deeming effect of s.22(3), "continuous service" should be given its ordinary meaning. The Macquarie Dictionary gives two meanings to "continuous" relevant here:
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> 1. having the parts in immediate connection, unbroken; and
>
> 2. uninterrupted in time; without cessation.
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> **[21]** In addressing the meaning of continuous the service at the time of the termination I should consider answers to questions such as whether it had parts in immediate connection? Was it unbroken? Was it uninterrupted in time? Was it without cessation? The services cannot be continuous if there were periods of absence. But if the absences were of a type within the meaning of s.22(2), then the service is deemed to be continuous.

[49] The approach here has been applied regularly by Members of the Commission when considering the question of whether service has been continuous. I also adopt this approach to the determination of whether Mr Mulipola's service could be considered continuous service.

[50] While Mr Mulipola seeks to rely on the Benchbook as to what might break continuous service, this information is not put forward in the Benchbook as exhaustive of what will break continuous service or determinative of what is continuous service. Further, I am persuaded by decisions of the Commission as to what may or may not constitute continuous service. That Mr Mulipola has found a conjunction of various excerpts from the Benchbook that meet his needs, none of which appear referable to decisions of the Commission or the Courts, does not convince me that I should stray from the accepted approach to this matter.

[51] Mr Mulipola's actual employment with Hays was broken by a rather lengthy period of time and there is no apparent connection between the two periods when he did work for Hays. Mr Mulipola does not say he was told during either assignment when he would be next required to work or offered work and the evidence before me does not support that such matters were discussed with him either by Hays or the Department of Health. To the extent that DVA spoke to Mr Mulipola of future work, this was subject to satisfactory completion of his initial period with it – something that did not occur.

[52] I am therefore not satisfied that Mr Mulipola worked continuously for Hays from January 2021 (or March 2021 when he had his first assignment) until May 2022.

(ii) If Mr Mulipola did not work continuously for Hays as he claimed, what was his period of service with Hays?

[53] It therefore falls to consider if Mr Mulipola's periods of engagement with Hays (at the Department of Health and with DVA) fall within the exception in s.384(2) of the FW Act.

[54] In determining this matter I reject Mr Mulipola's claim that his periods of service with Hays (or with clients of Hays) commenced at any time other than the commencement date of each assignment with the client to which he was sent to work (25 March 2021 with the Department of Health and 21 March 2022 with DVA). Mr Mulipola's claim that his second period of service with Hays commenced on the date he was advised by Hays that he was successful in relation to the placement with DVA does not stand up to scrutiny. Mr Mulipola was advised on 3 February 2022 that he was successful, but the details of the assignment were not given to him at this time. Hays emailed the details of this assignment to Mr Mulipola on 18 February 2022 and his commencement was not until 21 March 2022. If it was that Mr Mulipola was engaged on 3 February 2022 he certainly was not being paid and his Terms of Engagement with Hays make it clear that he does not get paid when he is "not performing any Casual Assignment." Except for when he was performing a "Casual Assignment" there was no exchange of wages for work performed.

[55] Mr Mulipola was advised by Hays on 3 February 2022 that he had been successful in his interview with DVA, on 18 February 2022 received confirmation of the commencement date of that assignment (notified as "TBC" but "likely to either be 14th or 21st March" 2022) and, on 14 March 2022, received a confirmation email from DVA advising that the assignment would commence on 21 March 2022.

[56] Mr Mulipola needs the Commission to accept that his second period of service commenced on 3 February 2022 (and certainly by no later than about 12 February 2022) so that the second period of service (with DVA), when added to the first period (with the Department of Health) is at least 6 months. If Mr Mulipola's service with DVA did not commence until 21 March 2022, even on his arguments, he has not completed the minimum employment period. That Mr Mulipola "forewent" other employment opportunities after 3 February 2022 because he was aware of the upcoming assignment with DVA was a choice he made and not a stipulation of the offer or acceptance of an assignment with DVA.

[57] The evidence before me does not support a finding that Mr Mulipola's second period of service commenced on 3 February 2022. That he was advised on this day that he would be

placed on assignment with DVA does not mean his service commenced on this day. Mr Mulipola was not required to undertake any work for Hays on this assignment until 21 March 2022, he was not paid until 21 March 2022 and could not be directed to do anything by Hays or DVA until 21 March 2022. Advice as to employment to commence at some future date does not create an employment relationship from the date of offer or advice or even acceptance of the offer.

[58] Mr Mulipola's submissions that his assignment commenced on 3 February 2022 is no more than an argument of convenience because the true commencement date does not provide the desired outcome.

[59] I am therefore satisfied that Mr Mulipola completed two periods of service with Hays – the first in 2021 of 3 months and 4 days and the second in 2022 of 7 weeks. His combined period of service is therefore less than 6 months.

[60] In the circumstances where Mr Mulipola was not employed continuously from 27 January 2021 and where his combined periods of service with Hays do not exceed 6 months he cannot, under any circumstance, have completed the minimum employment period necessary such that he is protected from unfair dismissal. Mr Mulipola therefore cannot make an application for unfair dismissal.

(iii) Was Mr Mulipola a regular casual employee (s.384(2)(a)(i) of FW Act)?

[61] Despite my findings above I will consider if Mr Mulipola came within the exception to the exemption of casual employment for the purposes of determining the period of employment.

[62] A regular casual employee is a casual employee employed on a regular and systematic basis.

[63] "Regular and systematic" is not defined in the FW Act. In *Yaraka Holdings Pty Ltd v Giljevic*[31] (**Yaraka Holdings**) the ACT Court of Appeal was considering an appeal in relation to whether the respondent was a "worker" employed pursuant to the *Workers Compensation Act 1951* (ACT). An issue in that appeal was if the Respondent was engaged on a "regular and systematic" basis.[32] It was held that:

> 68. The term "regular" should be construed liberally. It may be accepted, as the Magistrate did, that it is intended to imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant"…

[64] In his judgement Madgwick J added to this and concluded:

> 91. Engagement under contracts on a "systematic basis" implies something more than regularity in the sense just mentioned, that is, frequency. The basis of

[31] [2006] ACTCA 6

[32] Ibid at [61]

> engagement must exhibit something that can fairly be called a system, method or plan…

[65] Mr Mulipola was a casual employee engaged from time to time by Hays. He completed two distinct engagements with Hays across a 13½ month period (from his first engagement in March 2021 until the end of his second engagement in May 2022). From the time he signed a contract with Hays on 27 January 2021 Mr Mulipola was not engaged to perform any work on assignment for Hays prior to 25 March 2021. His pattern of engagement after this date was:

- 25 March 2021 to 29 June 2021 (approximately 3 months) – engaged by Hays
- 1 July 2021 to 20 March 2022 (approximately 8 months) – not engaged by Hays
- 21 March 2022 to 9 May 2022 (approximately 7 weeks) – engaged by Hays

[66] Applying the findings in *Yaraka Holdings* to Mr Mulipola's circumstances I am not satisfied that Mr Mulipola was employed on a regular and systematic basis by Hays.

[67] Mr Mulipola has been engaged twice by Hays across a period of just over 13 months separated by a lengthy period of engagement by another employer (a period longer than either engagement with Hays even taking each of those at their highest). Two single engagements separated by 8 months does not give frequency or constancy to the engagement. Further, I am not satisfied there was any plan or apparent system to Mr Mulipola's engagements. The work offered by Hays and accepted by Mr Mulipola did not occur often or regularly enough to be considered regular or systematic.

[68] I am not satisfied on the basis of two engagements spaced so far apart that Mr Mulipola was a regular casual employee with Hays.

(iv) During his casual employment did Mr Mulipola have a reasonable expectation of continuing employment by Hays on a regular and systematic basis? (s.384(2)(a)(ii) of the FW Act)

[69] I am not satisfied that during his casual employment with Hays Mr Mulipola had a reasonable expectation of continuing employment on a regular and systematic basis.

[70] I accept that the expectation of Mr Mulipola is a subjective matter to be determined by reference to his belief. The necessary question for the Commission to decide is whether that expectation of Mr Mulipola was, in the circumstances, a *reasonable* expectation. This is not a subjective determination. Rather, the reasonableness of the belief must be determined in light of all of the relevant circumstances.

[71] In *Bronze Hospitality Pty Ltd v Hansson (No 2)*[33] Jackson J said:

> 43 What the employer tells the employee must be relevant. Counsel for Bronze accepted his. If the employee in fact has the necessary expectation, and if what

[33] [2019] FCA 1680, (2019) 290 IR 344

> the employer said at the beginning of the employment was sufficient to make the expectation reasonable, and nothing in the circumstances indicated that what the employer said was unreliable, implausible or was otherwise to be disbelieved, then the criterion may be satisfied from that time. If nothing happens subsequently to show that the expectation will not be fulfilled, then it may subsist, as a reasonable expectation, throughout the entire period of service as a casual employee. There is nothing in the legislation which indicates that the employee's expectation cannot be reasonable until a pattern of regular and systematic employment, such as regular shifts, has in fact emerged. (Emphasis added)

[72] While the view expressed in *Bonze Hospitality* is in relation to the *creation* of a reasonable expectation, it is equally compelling where the intent was not to create any expectation of regular and systematic employment. Hays has done nothing contrary to its expressed intention in the contract signed by Mr Mulipola such that his expectation could be considered reasonable. Further, on its face, it is difficult to accept that two engagements, over 8 months apart, in circumstances where Mr Mulipola took a 7 month engagement with another employer, could create a *reasonable* expectation of regular and systematic employment with Hays.

[73] Mr Mulipola signed a contract with Hays that was explicit in its terms of the basis of his engagement by Hays – he would be employed as a temporary casual employee and he would be engaged and offered assignments on this basis – but Hays was under no obligation to offer him any casual assignments. Further, at the completion of his causal assignment with Hays at the Department of Health Mr Mulipola took up employment through a different employment agency. During this period there is no evidence that Mr Mulipola was contacted by Hays or that he was in contact with Hays in relation to his "expectation" of further engagement and he was not offered any further engagements by Hays until the DVA assignment in 2022.

[74] Mr Mulipola's assignment with the Department of Health was his first casual assignment with Hays on evidence. In the circumstances where there is no evidence of any representations being made to Mr Mulipola during that engagement of any future engagements, it is difficult to accept that any expectation he may have had during this period of employment of regular and systematic employment as a casual employee with Hays was reasonable.

[75] The evidence does not support a finding of any representations being made to Mr Mulipola during the period mid-2021 to early 2022 when he was not engaged by Hays such that he could have a reasonable expectation of employment as a regular and systematic casual employee with Hays.

[76] Mr Mulipola next performed work for Hays commencing on 21 March 2022. The actual period of engagement of Mr Mulipola was 7 weeks (although my analysis would be the same were it 3 months). Again, the evidence does not support a conclusion that any representation was made to Mr Mulipola by Hays that would vary what he was told when he signed his contract with Hays such that his belief as to future regular and systematic employment might be considered objectively reasonable.

Conclusion

[77] Mr Mulipola was not continuously employed by Hays for a period exceeding 6 months. Nor was Mr Mulipola engaged as a regular and systematic casual employee who, during such service had a reasonable expectation of continuing employment on a regular and systematic basis.

[78] I am therefore not satisfied that Mr Mulipola has served the minimum employment period necessary to enable him to make an application for remedy for unfair dismissal.

CONCLUSIONS TO OBJECTIONS

[79] For the reasons given above I am not satisfied Mr Mulipola has served the minimum employment period specified in s.383 of the FW Act. Mr Mulipola is therefore not protected from unfair dismissal (s.382(a) of the FW Act) and not eligible to make an application seeking relief from unfair dismissal.

[80] Having found that Mr Mulipola has not served the minimum employment period it is not necessary to determine to finality the other objections raised by Hays and DVA. I would observe however that it is not apparent on the evidence before me that:

- Mr Mulipola's employment has been terminated;
- Accessorial liability matters in the FW Act arise.

[81] Further, it appears, on the material before me, that Hays is Mr Mulipola's employer and that Mr Mulipola was not employed by DVA (and a determination that he was employed by DVA would not assist Mr Mulipola in his application before the Commission).

[82] Mr Mulipola's application for relief from unfair dismissal is dismissed on the grounds that he has not served the minimum employment period and therefore is not protected from unfair dismissal. An order[34] to this effect will be issued shortly.

COMMISSIONER

Appearances:

S. Mulipola on his own behalf.

C. Botha for Hays Specialist Recruitment (Australia) Pty Limited.

D. Cooper for Department of Veterans Affairs.

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[34] PR744393

Hearing details:

2022.
Melbourne by telephone:
July 29.

Printed by authority of the Commonwealth Government Printer

<PR744392>